DOCKET FILE COPY ORIGINAL
ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
MAR 23 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Re:

Petition of LCI International Telecom Corp.	)	
For Adoption of A "FastTrack" Plan to	)	
Expedite Residential Local Competition and	)	CC Docket No. 98-5
Section 271 Entry Through Establishment of	)	
Independent RBOC Wholesale and Retail	)	
Service Companies	)	

COMMENTS OF
FIBERNET TELECOM, INC.
ON LCI "FAST TRACK" PROPOSAL

INTRODUCTION

FiberNet Telecom, Inc. ("FiberNet"), by its undersigned counsel, hereby submits its Comments in response to Commission Public Notice DA 98-130 in the the above-captioned proceeding. On January 22, 1998, LCI International Telecom Corp. ("LCI") submitted a Petition ("Petition") suggesting a "Fast Track" plan to facilitate local competition under 47 U.S.C. §271 ("Section 271" *et. al*). In particular, LCI's plan would allow an RBOC the presumption that it complies with the Section 271 "checklist" for opening local markets to competitors if that RBOC divided itself into a holding company ("HoldCo"), and a wholesale and retail subsidiary ("NetCo" and "ServeCo"), with a variety of conditions attached. As FiberNet is building networks to compete with incumbent carriers, it has a strong interest in ensuring nondiscriminatory access to local facilities and services. Thus, FiberNet respectfully requests that the Commission undertake any effort that will expedite this process. Although FiberNet generally supports LCI's approach, FiberNet advocates stronger measures than those proposed by LCI, such as mandated divestiture or restructuring, greater safeguards to ensure even-handed dealing by NetCo, and applying these requirements to non-RBOC incumbents.

I. BACKGROUND

LCI's Petition aptly calls attention to the perverse incentives that incumbent carriers have in serving competitors. The greater an ILEC's cooperation in smoothly transitioning to a competitive environment, the more the ILEC has to lose as it watches its once captive customers flee to CLECs. Not surprisingly, this evolution is rife with conflict, costing hundreds of millions of dollars in legal fees and considerably more in the opportunity costs that CLECs incur in not being able to offer local services on a ubiquitous basis. This dilemma threatens to persist in perpetuity regardless of an RBOC's compliance with Section 271.

To cure the problem, LCI has proposed that RBOCs be presumed to have complied with Section 271, and thus incented to provide in-region long-distance service, if they voluntarily restructure themselves into a HoldCo, which will continue to own 100% of NetCo, and up to 60% of ServeCo. NetCo would own and operate the local exchange and network assets and would become a wholesale carrier, providing its facilities to the CLECs, including ServeCo, on an arms-length basis. (This would include all facilitites as well as capabilities for ordering, provisioning, maintenance and repair, billing, collection, and other operations support systems.) NetCo and ServeCo would not share facilities, functions, services, employees, or brand names. ServeCo would have 40% or more public ownership, a board with independent directors, and compensation for ServeCo management would be based only on ServeCo's performance. NetCo would not engage in any retail marketing but would retain current RBOC customers until a balloting process is complete, during which time ServeCo and other CLECs would vie for customers on an equal basis. ServeCo would not initially offer interLATA service to NetCo's customer base.

As LCI contemplates it, NetCo will have an incentive to maintain its role as a neutral wholesaler, lest competitors build infrastructure to edge out NetCo's role. With up to 40% of outside capital and independent officers, directors and managers, ServeCo will have fiduciary obligations to all stockholders. LCI contends that these will assure that its operations are not oriented toward serving the interests of the RBOC. LCI also notes that its plan goes beyond the structural separation requirements of 47 U.S.C. §272, as set forth in the *Non-Accounting Safeguards Order*[1], because the RBOCs would agree that all retail services will be provided through ServeCo and because the public company status and outside management and control assures greater independence than contemplated in the separate subsidiary provisions of Section 272. ServeCo would not be considered as a successor or assign for purposes of the obligations of Section 251(c). NetCo, on the other hand, would be considered subject to those obligations since it will be wholly owned by HoldCo.

II. ANALYSIS

LCI's Petition is an important initiative to bring attention to the continuing difficulties of implementing local competition, as well as the perception that the 1996 Telecommunications Act has been ineffective. Thus, FiberNet fully supports further discussion in the context of LCI's proposal. FiberNet suggests, however, that the proposal in its current form does not adequately ensure separate ownership and operation of network facilities from the RBOC.

The RBOCs' conflicts of interest are rooted in their simultaneous control of bottleneck facilities and the fact that they are competing against CLECs who are dependent on those same

---

[1] 11 FCC Rcd 21905 at 21913-5, 22054-8 (1997).

facilities, particularly the loop network -- which might never be duplicated -- and various functions such as OSS. Yet the LCI proposal would still allow NetCo the ability and incentive to overprice or otherwise restrict access to the bottleneck loops, and to cross-subsidize the more competitive elements of its network. NetCo would still have an incentive to manage its bottleneck facilities in ways that would give an advantage to ServeCo, even if the proposed restructuring would dilute the incentive by 40%. In addition, there is a potential for service-related discrimination, including selective delay tactics and pricing that would tend to maintain the subsidized nature of ServeCo's rural service. NetCo could even delay the availability of emerging xDSL technology (which will provide customers with faster access to data networks) until ServeCo is ready. Thus, FiberNet recommends that the remaining RBOC, or HoldCo, be limited to no more than a 25% interest in its wholesale (NetCo) subsidiary, affilated with no more than 25% of the NetCo Board of Directors, and required to fulfill appropriate reporting requirements to the Commission and relevant state commissions. In this way, NetCo is truly free of anticompetitive incentives. With 75% of NetCo publicly held, market investments would value the company in light of any attendant risks including changes in regulation. NetCo directors and management should be independent and with no incentives to favor HoldCo.

In citing the need for independent performance incentives and benchmarks for ServeCo. LCI's proposal is certainly on target. However, FiberNet believes that a 40% divestiture does not fully accomplish this goal. Even with outside directors and managerial compensation tied only to ServeCo performance, a 60% ownership block will still have have the ability to advance its own interests. Accordingly, FiberNet suggests that HoldCo hold only a 49% ownership interest in ServeCo, and be precluded from control of the ServeCo board.

Finally, even if the Commission determines that a disaggregated RBOC is entitled to a presumptive favorable Section 271 finding, it should monitor the emergence of local competition. It will be necessary to determine whether the restructuring is effective and, in any case, whether the RBOC conduct continues to obstruct local markets. FiberNet also recommends adopting a procedure whereby, if a CLEC makes a *prima facie* showing of anticompetitive behavior by one of the RBOC entities, the burden of proof should then shift to the RBOC to demonstrate that it is entitled to remain in the in-region interLATA market because it is not acting in an anticompetitive fashion.

III. OTHER APPROACHES

To the extent that the LCI Petition has presented a framework for resolving the stalemate over local competition (and FiberNet advocates that it should), FiberNet would like to propose alternatives towards promoting nondiscriminatory use of the public switched network. While complete divestiture of the wholesale and retail elements of an ILEC is the most desirable solution, the Commission should also consider mandating this and other proposals, having such plans apply to independent LECs, using the Independent System Operator ("ISO") model, or introducing other elements of independence into the NetCo and ServeCo components of presently structured ILECs.

First, LCI proposes that the Commission use its authority to mandate restructuring -- of the type endorsed in these Comments, if not complete divestiture. Given the importance of making competitive local telecommunications offerings available on a ubiquitous basis, it is appropriate that a high degree of energy be expended over LCI's or similar proposals. However, if RBOCs can easily dismiss them as inconsistent with their strategies, the entire effort will be for nought.

Second, under LCI's proposal, independent ILECs are under no pressure to agree to the realignments discussed. Independent ILECs normally have the same structural problems with respect to CLECs as do the RBOCs. In particular, ILECs can be at least as intransigent in granting fair access to the bottleneck facilities that they control. Thus, the Commission should consider its authority to implement a plan on a wider scale.

Third, an alternative that the Commission should consider is a model from the electric distribution industry, the ISO, which services carriers by providing facilities to all retail competitors on an equal basis. In this context, the ISO would have exclusive rights to manage local loops. The ISO would be a not-for-profit entity controlled by a board including representatives of ILECs, CLECs, and resellers, among others. Both ILECs and CLECs would have the right to overbuild the ISO loop network, a threat that would give the ISO an incentive to charge cost-based rates. In any case, the ISO's rates should be regulated.

Fourth, the Commission could mandate various additional types of independence within an ILEC organization to prevent the perverse incentives and unfair dealing of the type described by LCI. One example is a requirement for outside directors, officers, or managers, such as publicly-appointed directors as has been required by statute for Comsat.[2] The Commission could also require divestiture of a company which would only control access to unbundled loops (based on the Empire City Subway model for conduit access). This could entail a partial or complete divestiture.

Any solution would be ideal if ILECs agree to participate voluntarily. Short of that, however, the Commission should explore any authority that it can invoke to achieve the goals for which these proposals strive.

CONCLUSION

Because it will never be wholly realistic to expect incumbent carriers to offer their facilities and services to a CLEC in the same manner that it serves its own customers, FiberNet respectfully

---

[2] 47 U.S.C. §733.

requests that the Commission use its authority to compel RBOCs and ILECs to restructure themselves in accordance with the proposals described in these Comments. FiberNet endorses any attention that the Commission can give to this issue, in the interest of resolving continuing conflicts over use of the public switched network and thereby making choices available to consumers as early as possible.

Respectfully submitted,

Dana Frix
Jonathan D. Draluck
SWIDLER & BERLIN CHARTERED
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (tel.)
(202) 424-7645 (fax)

Counsel for FiberNet Telecom, Inc.

March 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 23d day of March, 1998, copies of the foregoing Comments of Fibernet Telecom, Inc. On LCI "Fast Track" Petition, were sent via courier or overnight delivery to the following:

Janice M. Myles,
Common Carrier Bureau
U.S. Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, DC 20036

Peter A. Rohrbach
Linda L. Oliver
Hogan & Hartson L.L.P.
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Rocky N. Unruh
Morgenstein & Jubelirer
One Market
Spear Street Tower, 32d Floor
San Francisco, CA 94105

Eugene D. Cohen
326 West Granada Road
Pheonix, AZ 85003

Anne K. Bingaman
Douglas W. Kinkoph
LCI International Telecom Copr.
8180 Greensboro Drive, Suite 800
McLean, VA 22102

Karen McBrice

230301.1